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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS ALAN STRAWN,

Defendant and Appellant.

E060685

(Super.Ct.No. FSB06205)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith,
Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Thomas Alan Strawn appeals from an order denying his petition for recall of an indeterminate life term under Penal Code section 1170.126, subdivision (f).¹ We affirm the order.

BACKGROUND

On December 19, 1994, defendant pled guilty to two counts of first degree burglary (§ 459) and admitted to having two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). On that date the trial court sentenced defendant, as agreed, to two consecutive terms of 25 years to life.

On November 6, 2012, the electorate passed Proposition 36, also known as the Three Strikes Reform Act. Among other things, this ballot measure enacted section 1170.126, which permits persons currently serving an indeterminate life term under the “Three Strikes” law to file a petition in the sentencing court, seeking to be resentenced to a determinate term as a second striker. (§ 1170.126, subd. (f).) If the trial court determines that the defendant meets the criteria of section 1170.126, subdivision (e), the court may, in its discretion, resentence the defendant. (§ 1170.126, subds. (f) & (g).)

Section 1170.126, subdivision (e), provides, as pertinent here, that a defendant is eligible for resentencing if he or she is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of section 667 or subdivision (c) of section 1170.12 “for a conviction of a felony or felonies that are not

¹ All future statutory references are to the Penal Code unless otherwise stated.

defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.” (§ 1170.126, subd. (e)(1).)

On January 9, 2014, defendant filed a petition for recall of sentence under section 1170.126. The trial court denied the petition on February 5, 2014, finding defendant ineligible for resentencing under section 1170.126 because his current commitment offenses for residential burglary are serious felonies. Defendant filed a timely notice of appeal.²

DISCUSSION

We appointed counsel to represent defendant on appeal. After examining the record, counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a summary of the facts and potential arguable issues, and requesting this court conduct an independent review of the record.

² We note that the California Supreme Court has granted review in cases that have found that the trial court’s order on a postjudgment petition pursuant to section 1170.126 is a nonappealable order. (See, e.g., *Teal v. Superior Court* (2013) 217 Cal.App.4th 308, review granted July 31, 2013, S211708; *People v. Hurtado* (2013) 216 Cal.App.4th 941, review granted July 31, 2013, S212017, briefing deferred pursuant to rule 8.512(d)(2), Cal. Rules of Court.) Even if we were to conclude it was a nonappealable order, we could consider, in the interest of judicial economy and because of uncertainty in the law, that defendant’s appeal is a petition for writ of habeas corpus or petition for writ of mandate. (See *People v. Segura* (2008) 44 Cal.4th 921, 928 fn. 4 [treating appeal from nonappealable order as petition for writ of habeas corpus]; *Drum v. Superior Court* (2006) 139 Cal.App.4th 845, 853 [Fourth Dist., Div. Two] [treating appeal as petition for writ of mandate due to uncertainty in the law].) In *People v. Leggett* (2013) 219 Cal.App.4th 846, 854, the appellate court expressed that when a trial court must determine whether the prior convictions qualify under the resentencing provision, such issue is appealable. We will review defendant’s appeal.

We offered defendant an opportunity to file a personal supplemental brief, but he has not done so.

Proposition 36 added section 1170.126, which applies exclusively to those “persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence.” (§ 1170.126, subd. (a).) Section 1170.126 sets forth a procedure through which certain prisoners can petition the court for resentencing. Such a person may file a petition to recall his or her sentence and be sentenced as a second strike offender. (§ 1170.126, subd. (b).) An inmate is eligible for such resentencing if his or her commitment offense does not constitute a serious or violent felony. (§ 1170.126, subd. (e)(1).)

Defendant’s current convictions for residential first degree burglary are serious felonies under California sentencing law. (See §§ 667, subd. (d)(1), 1192.7, subd. (c)(18).) Defendant is therefore ineligible for resentencing under section 1170.126.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error and find no arguable issues.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

MILLER
J.